No. 80-620

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MICHAEL RODAK, JR

IN THE

Supreme Court of the United States

October Term, 1980

JOHN J. AYOOB, HUGH IORFIDO, ROSS M. KEEFER, LEWIS E. KIRCHNER, JOSEPH LIBERATI, STEPHEN MIHALIC, ARTHUR L. SCHLEMMER, GEORGE L. SHAFFER, MILTON H. RICHAEL, individually and as District Magistrates in the County of Beaver and their successors in office,

Petitioners,

vs.

PATRICIA MORRISON, BLANCHE LOWE, RACHEL DAWKINS, GEORGE BLACK, and all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE STATE OF MINNESOTA AND THE SUPREME COURT OF THE STATE OF MINNESOTA, AS *AMICI CURIAE*, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

WARREN SPANNAUS
Attorney General
State of Minnesota
D. DOUGLAS BLANKE
Special Assistant
Attorney General
515 Transportation Bldg.
St. Paul, Minnesota 55155
(612) 296-2586
Counsel of Record

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INTEREST OF AMICI CURIAE

The State of Minnesota and its Supreme Court, through the Minnesota Attorney General, respectfully offer this brief as *amici curiae*, in support of the petition for a writ of certiorari. As the highest court of the State of Minnesota, the Minnesota Supreme Court has inherent supervisory authority over the conduct of proceedings in all courts of the State, and has appellate jurisdiction for the correction of any constitutional errors which they may commit. If the construction of 42 U.S.C. § 1988 adopted by the Court of Appeals in this action is upheld, the judges of the courts of Minnesota will become potentially liable for substantial awards of attorney's fees in actions brought under 42 U.S.C. § 1983. The Minnesota Attorney General, as the chief legal officer of the State, has responsibility for defending those actions. For these reasons, the *amici* have a substantial and continuing interest in the case at bar.

SUMMARY OF ARGUMENT

From the earliest days of the common law, judges have been held absolutely immune from civil liability for their judicial acts, in recognition of the destructive effect which harrassing suits and potential liability would have on the independence of the judiciary. To award attorney's fees against judges under 42 U.S.C. § 1988 would be equally destructive, and would inhibit fearless and independent decision-making. Such a result should not lightly be imputed to Congress, and neither the statute on its face nor the legislative history manifests an intention to abrogate this ancient and honored doctrine. Moreover, the concerns which gave rise to judicial immunity are fully applicable to actions for declaratory and injunctive relief,

and, in the absence of a clear congressional intent to discard that immunity, judges should be held immune from § 1983 actions for prospective relief. This conclusion is buttressed by the availability of alternative forums for the vindication of individual rights and by comparison with the immunity afforded to legislators.

ARGUMENT

I. JUDICIAL IMMUNITY BARS AN AWARD OF ATTORNEY'S FEES AGAINST JUDGES UNDER 42 U.S.C. § 1988.

This case presents the important and unresolved question whether attorney's fees under 42 U.S.C. § 1988 may be awarded against a judge acting in his judicial capacity. The Court of Appeals for the Third Circuit has in this case approved such an award. This ruling threatens the independence of state judges, and is contrary to the deeply-rooted policies which underlie the principle of judicial immunity.

As this Court has often observed, the absolute immunity of judges for acts committed within their judicial jurisdiction has roots extending to the earliest days of the common law; few doctrines are more solidly established. *See, e.g., Imbler v. Pachtman*, 424 U.S. 409, 418, 422, n.20 (1976); *Pierson v. Ray*, 386 U.S. 547, 554 (1967). Indeed, the Court whose decision is questioned here, the Court of Appeals for the Third Circuit, has itself suggested that judicial immunity is so essential to the independence of the judiciary that it may be constitutionally mandated under the Guarantee Clause, as an indispensable attribute of a republican form of government. *Bauers v. Heisel*, 361 F.2d 581, 588, 589 (3d Cir. 1966), *cert. den.* 386 U.S. 1021 (1967).

From this Court's adoption of the immunity doctrine, in *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872), to its most recent pronouncement, *Dennis v. Sparks*, —— U.S. ——, 49 U.S.L.W. 4001 (November 17, 1980), the purpose of immunizing judges has been clearly stated: "the point . . . is to forestall an atmosphere of intimidation that would conflict with their resolve to perform their designated functions in a principled fashion." *Ferri v. Ackerman*, 444 U.S. 193, ——, 100 S.Ct. 402, 409 (1979). To allow attorney's fees against judges would be to defeat this purpose. Such fee allowances would inescapably "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949) (L. Hand, J.) *cert. den.* 339 U.S. 949 (1950).

The threat of a $50,000 award for attorney's fees is no less disconcerting to a potential defendant than is the threat of a $50,000 award for damages. Respondents apparently contend, however, that judges will not be influenced by attorney's fee awards because such awards will be paid from public funds.[1] This argument—that an award directly against a judge would be intimidating, but that an award against public funds is a matter of no concern to the judge—both overstates the practical impact of the former award and understates the impact of the latter.

An award against a judge in his individual capacity, if it were not barred by judicial immunity,[2] would probably be

[1] It should be emphasized that the instant Respondents disavow any claim of attorney's fees against the Petitioners in their individual capacities. The attorney's fees sought, and awarded by the court below, were awarded against Petitioners in their official capacities. Such awards are payable from public funds and not by the individuals involved. Hutto v. Finney, 437 U.S. 678 (1978).

[2] It is undisputed here that such an award is absolutely barred by judicial immunity.

paid in practice from public funds. This is the case because many states, including Minnesota, authorize the idemnification of public officers for liabilities unintentionally incurred by them in good faith in the course of their duties. *See, e.g.*, Minn. Stat. § 3.736, Subd. 9 (1978). Moreover, the suggestion that judges would be unaffected by awards against the funds of their offices does scant justice to their sense of public responsibility. The prospect of large, if not crippling, fee awards against the public funds with which they are entrusted would be profoundly disturbing to all conscientious jurists. This concern would be heightened both by the dramatic proliferation of § 1983 suits in recent years, and by the fact that attorney's fee awards of $50,000 and more are becoming commonplace. Only the most sanguine observer would insist that such a continuing risk would not influence judicial decision-making, if only subtly and subconsciously.

This intimidating influence would be enhanced by the fact that fee awards under § 1988 are to be collected "*either directly from the official, in his official capacity, from funds of his agency or under his control*, or from the State or local government (whether or not the agency or government is a named party)." S. Rep. No. 94-1011, 94th Cong., 2d Sess., 5 (1976), U.S. Code Cong. & Admin. News (1976), 5908, 5913 (emphasis added). Unlike heads of sprawling governmental departments, judges do not typically have at their disposal vast budgets capable of absorbing unforeseen costs of this magnitude. Instead, the effect of imposing fee awards would be to send state judges, hat in hand, to legislatures for a special appropriation to pay each fee award.

Further, the many state judges who are elected to office will be held accountable to the electorate for having subjected taxpayers to substantial awards for costs. Yet, as this case illus-

trates, such costs could be imposed without even an allegation, much less proof, that the judge had acted in bad faith. Liability for costs would thus be both unfair and likely to have a direct and very personal effect on the judge.

That costs such as attorney's fees can indeed affect officials' decision-making is demonstrated by this Court's own decision in *Hutto v. Finney*, 437 U.S. 678 (1978).[3] There, this Court described attorney's fees as one of the "financial penalties" which may be used as "effective enforcement weapons" to elicit compliance with an injunction. *Id.*, 437 U.S. at 690. The Court noted that "the power to assess costs is an important and well-recognized tool used to restrain the behavior of parties during litigation." *Id.*, 437 U.S. at 695, n.24. Because this "weapon" can indeed shape the actions of officials, even when fees are awarded against public funds, it would be disingenuous to assert that the prospect of such costs will not have an intimidating effect.

Should § 1988 be read, then, as abrogating judicial immunity? Such an abrogation is not lightly to be inferred. *Pierson v. Ray, supra*; *Bauers v. Heisel, supra*; *cf. Tenny v. Brandhove*, 341 U.S. 367 (1951). Judicial immunity is so firmly established that this Court concluded in *Pierson v. Ray, supra*, 386 U.S. at 554, 555, that "Congress would have specifically so provided had it wished to abolish the doctrine."

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[3] Hutto v. Finney, supra, held that the Eleventh Amendment does not bar an award of attorney's fees against a State in conjunction with the issuance of declaratory and injunctive relief. The absence of such an Eleventh Amendment bar, however, offers no guidance in determining whether, as against judicial officers, there remains a bar of judicial immunity. The policies of federalism which inform Eleventh Amendment analysis are also present here, because § 1983 actions would place federal courts in the position of enjoining state judges, but the policies which give rise to judicial immunity are entirely distinct, and are independent of the concerns considered in Hutto.

In this area, where the immunity in question is so deeply-rooted, and where sensitive issues of federalism are implicated, the Court should not infer an abrogation of immunity in the absence of explicit statutory language.[4] Here, the statute contains no such language. Instead, the Court of Appeals looked to the legislative history, and rested its decision upon a single paragraph in the House Report stating that counsel fees are to be available "in some cases, [where] immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy." H. Rep. No. 94-1558, 94th Cong., 2d Sess., 9 (1976). The Report contains no express reference to judicial immunity, but the Court of Appeals inferred an intent to abrogate that immunity from the general reference to "immunity doctrines" and from the Report's citation of *Pierson v. Ray, supra,* along with two cases involving the qualified immunity of executive officials.

Ironically, it is the *Pierson* case which establishes that an intent to abolish judicial immunity must be expressly stated. Surely, if Congress had intended such an abrogation, the citation to *Pierson* is evidence of its awareness of the need to do so explicitly. Because *Pierson* involved not only a judge, but also police officers, and established the "special defenses" of good faith and probable cause for police officers, the House Committee's citation to *Pierson* is at most ambiguous, and can equally be understood as referring to these "special defenses." Something more than this is required to abolish a principle so deeply rooted in our history and so essential to an independent judiciary.

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[4] Cf. Hutto v. Finney, supra, 437 U.S. at 706 (Powell, J. *concurring in part and dissenting in part*). *See also* Tribe, *Intergovernmental Immunities in Litigation, Taxation and Regulation: Separation of Powers Issues in Controversies about Federalism,* 89 Harv.L.Rev. 682, 695 (1976).

II. JUDICIAL IMMUNITY BARS SUITS AGAINST JUDGES FOR INJUNCTIVE OR DECLARATORY RELIEF UNDER 42 U.S.C. § 1983

Because the policies supporting judicial immunity in damage actions are equally applicable to an award of attorney's fees, such an award is barred by immunity, whether or not judges are absolutely immune from suits for prospective relief under § 1983. Thus, the Court need not reach the question—which it has not addressed, *Supreme Court of Virginia v. Consumers Union*, —— U.S. ——, ——, 100 S.Ct. 1967, 1976 (1980)—whether judicial immunity bars declaratory or injunctive relief. If the Court does reach the issue, however, the considerations which give rise to judicial immunity from other civil actions, and to the absolute immunity of legislators, are equally apposite, and compel the conclusion that judicial immunity from civil suits is absolute. Where such absolute immunity exists, there can be no award of attorney's fees. *Supreme Court of Virginia v. Consumers Union, supra*, —— U.S. at ——, 100 S.Ct. at 1978.

The lower federal courts are divided on the propriety of suits for prospective relief, *see Supreme Court of Virigina v. Consumers Union, supra*, —— U.S. at ——, n.13; 100 S.Ct. at 1976, n.13. The rationale of this Court's judicial immunity decisions, however, supports the view that judicial immunity extends to all civil suits, regardless of the nature of the relief sought. *See e.g., Conover v. Montemuro*, 477 F.2d 1073, 1104 (3d Cir. 1973) (Aldisert, J., *concurring*); *Zimmerman v. Spears*, 428 F.Supp. 759, 761 (W.D. Tex. 1977); *Mirin v. Justices of Supreme Court of Nevada*, 415 F.Supp. 1178 (D. Nev. 1976); *Atchley v. Greenhill*, 373 F.Supp. 512, 514, 515 (S.D. Tex. 1974), *aff'd* 517 F.2d 692 (5th Cir. 1975), *cert. den.*, 424

U.S. 915 (1976); *Smallwood v. United States*, 358 F.Supp. 398, 403 (E.D. Mo. 1973), *aff'd* 468 F.2d 1407 (8th Cir. 1973); *Mackay v. Nesbitt*, 285 F.Supp. 498, 502, 503 (D. Alaska 1968), *aff'd* 412 F.2d 846 (9th Cir. 1969), *cert. den.* 396 U.S. 960 (1969).

In case after case, this Court has emphasized that judicial immunity is necessary to protect judges against the harrassing and intimidating influence of being compelled to defend themselves in vexatious civil actions. This burden inheres in any civil action, regardless of the nature of the relief sought or the ultimate outcome of the case. Judicial immunity reflects the conviction that a judge:

> . . . should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.

Pierson v. Ray, supra, 386 U.S. at 554.

Similarly, in *Bradley v. Fisher, supra*, 80 U.S. (13 Wall.) at 347, this Court stated that "[l]iability to answer to everyone who might feel himself aggrieved by the action of the judge . . . would destroy that independence without which no judiciary can be either respectable or useful." Judicial immunity is thus a response to concern that:

> harrassment by unfounded litigation would cause a deflection of the [judge's] energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.

Imbler v. Pachtman, supra, 424 U.S. at 422, 423 (referring to prosecutors, and to the common concerns justifying the immunity of prosecutors, judges and grand jurors). This danger is completely independent of the nature of the civil action, or its final disposition. Even if a judge is certain of ultimate vindication, and thus is free from personal financial consequences, the risk of having to *defend* a suit may nevertheless be a substantial deterrent to fearless action. *Cf. Imbler v. Pachtman, supra,* 424 U.S. at 438, n.4 (White, J., *concurring*).

In this respect, judges are precisely analogous to legislators. To preserve legislative independence, legislators must be protected "not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski v. Eastland,* 387 U.S. 82, 85 (1967). State legislators and Members of Congress are thus immune from all civil actions, regardless of the relief sought, because " 'a private civil action, whether for an injunction or damages, creates a distraction and forces [legislators] to divert their time, energy, and attention from their legislative tasks to defend the litigation.' " *Supreme Court of Virginia v. Consumers Union, supra,* —— U.S. at ——, 100 S.Ct. at 1975, *quoting Eastland v. United States Servicemen's Fund,* 421 U.S. 491, 503 (1975). Even if the relief sought is wholly prospective, private civil actions may be used to delay and disrupt the legislative function. *Eastland v. United States Servicemen's Fund, supra.*

The potential for distraction, harrassment and disruption is at least as great in the judicial sphere. As the Court of Ap-

peals for the First Circuit observed in holding that judges, like legislators, are immune from § 1983 damage actions:

> Certainly it would be absurd to hold, in the application of the Civil Rights Act, that judicial officers of a state stand in any less favorable position than do state legislators, in respect to immunity from civil liability for acts done in their official capacity.

Francis v. Crafts, 203 F.2d 809, 812 (1st Cir. 1953), *cert. den.* 346 U.S. 835 (1953).

Indeed, the case for immunity from prospective relief is stronger in the judicial than in the legislative sphere. This is true because immunity is justified in part by the existence of alternative forums and methods for vindication of individual rights. While few such remedies are available for correction of legislative abuses, "the law has provided for private parties numerous remedies" for the correction of judicial errors. *Bradley v. Fisher, supra*, 80 U.S. (13 Wall.) at 354. Judges, like legislators, are subject to impeachment. *Id.* In many states, they are also accountable at elections. Further, judges are subject to criminal punishment for any willful deprivation of constitutional rights. 18 U.S.C. § 242; *Imbler v. Pachtman, supra*, 424 U.S. at 429. Like prosecutors, they are also subject to professional discipline.

Moreover, apart from proceedings to punish or remove a judge, a disappointed civil litigant or criminal defendant has abundant opportunity to correct judicial errors.[5] Litigants

[5] The instant case illustrates the availability of alternative forums. As the Court of Appeals noted, the right-to-counsel issue involved in this action was asserted contemporaneously in an unrelated case, on an appeal from a defendant's conviction. The conviction was reversed, and the President Judge of the County Court of Common Pleas subsequently instructed the judges of his district to see that counsel were provided to all such defendants. Thus, this clear constitutional deprivation was capable of swift correction without the need to subject judges to a civil action.

are not only afforded an initial opportunity for hearing, but also an opportunity to invoke the judge's remedial powers in post-trial proceedings; to pursue an appeal; in criminal cases, to invoke state and federal post-conviction remedies; and, in proper cases, to obtain extraordinary writs. In many instances, the desired relief could also be attained by an action against other defendants, such as enforcement officers, who are not shielded by judicial immunity. *See, e.g., Supreme Court of Virginia v. Consumers Union, supra.*

This wide array of alternative forums makes absolute judicial immunity at least as defensible as the absolute immunity afforded legislators. To authorize further review of a judge's decision in § 1983 actions would in many cases necessitate a virtual retrial of the original action in a new forum, before a new judge. Such a retrial would defeat one of the fundamental purposes of judicial immunity, which is to prevent "the manifest injustice of placing any man in a position where his judgment is required, and at the same time holding him responsible according to the judgment of others." Prosser, *Law of Torts,* (Hornbook Series, 4th Ed. 1971) § 132 at 988.[6]

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[6] Further support for this view can be found in this Court's recent ruling that state legislators are insulated from suits for prospective relief. *Supreme Court of Virginia v. Consumers Union, supra,* —— U.S. at ——, 100 S.Ct. at 1974, 1975. The ruling was based in part on the fact that the Court's prior pronouncements on the subject had described legislators as immune from "civil liability" without distinguishing between damage actions and injunctive actions. The same observation may be made here. This Court has often described judges as immune from "civil liability", without distinguishing between damage and injunctive actions. *See, e.g., Bradley v. Fisher, supra,* 80 U.S. (13 Wall.) at 347 (citing the "exemption of judges from civil liability"). In *Pierson v. Ray, supra,* 386 U.S. at 555, n.9, for example, the Court stated flatly that "judicial immunity is a defense to an action under § 1983." As in the *Supreme Court of Virginia* case, the unqualified language of this Court's prior decisions supports an expansive reading of the scope of judicial immunity.

In addition to the burden of defending civil suits, the remedy of injunctive relief may itself have a chilling influence on judicial independence. Inherent in an injunction are the traditional sanctions for its enforcement, including imprisonment and fines for contempt. *Conover v. Montemuro, supra,* (Aldisert, J., *concurring*). These sanctions, by definition, are meant to alter the behavior of the parties against whom they are directed, and they are used both to punish noncompliance and to compensate prevailing litigants. *Cf. Hutto v. Finney, supra.* Such sanctions thus hold the same potential for inhibiting forceful decision-making as do damage remedies. The nature of injunctive relief, therefore, and, more importantly, the harrassing and intimidating effect of subjecting judges to civil litigation, both counsel against the abrogation of judicial immunity in § 1983 actions, even where the relief sought is wholely prospective.

CONCLUSION

The absolute immunity of judges from civil liability for their decisions is a deeply-rooted principle essential to the integrity and independence of the judiciary. The concerns which give rise to that immunity are as applicable to an allowance of costs as they are to an allowance of damages, and preclude an award of attorney's fees under 42 U.S.C. § 1988. *Amici curiae* join the Petitioners in urging the Court to grant the writ of certiorari and to reverse the decision of the Court of Appeals.

Dated: December 9, 1980.

Respectfully submitted,

WARREN SPANNAUS
Attorney General
State of Minnesota
D. DOUGLAS BLANKE
Special Assistant
Attorney General
515 Transportation Building
St. Paul, Minnesota 55155
(612) 296-2586
Counsel of Record